

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEVIN LAWRENCE HENDRICKSON,

Petitioner,

v.

ALICE PAYNE,

Respondent.

Case No. C06-5331 RBL/KLS

REPORT AND
RECOMMENDATION

**NOTED FOR:
August 25, 2006**

The petitioner in this action is seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. This case has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636 (b) (1) and Local MJR 3 and 4. Petitioner has been granted leave to proceed *in forma pauperis*. (Dkt. #3). Petitioner seeks to challenge a February 2006 conviction and sentence. (Dkt. # 1). On July 3, 2006, the court ordered petitioner to show cause why his petition should not be dismissed because it appeared his claim appeared unexhausted. (Dkt. # 6). Petitioner's timely response to the court's show cause order is now before the court. (Dkt. #7). Upon review, it is the court's recommendation that the petition should be dismissed without prejudice because petitioner has failed to properly exhaust his state court remedies.

DISCUSSION

In order for a federal district court to review the merits of a § 2254 petition, the petitioner must first exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A); Fields v. Waddington, 401 F.3d 1018, 1020 (9th Cir. 2005). A petitioner can satisfy the exhaustion requirement by either (1)

1 fairly and fully presenting each of his federal claims to the state's highest court, or (2) demonstrating
2 that no state remedies are available to him. Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996)
3 (internal citations omitted). Thus, "a would-be habeas corpus petitioner must await the outcome of
4 his [state court] appeal before his state remedies are exhausted." Sherwood v. Tomkins, 716 F.2d
5 632, 634 (9th Cir. 1983).

6 In this case, the record indicates that a direct appeal of petitioner's state court sentence is
7 currently pending in the Washington Court of Appeals Division II. (Dkt. # 7-1, p. 11). Petitioner's
8 state court remedies are therefore unexhausted. A federal court faced with an unexhausted petition
9 dismisses the petition, without prejudice, so that the petitioner has an opportunity to exhaust the
10 claims in state court. Rose v. Lundy, 455 U.S. 509, 522 (1982). Petitioner should be given that
11 opportunity.

12 CONCLUSION

13 Based on the foregoing discussion, the Court should **DISMISS** the petition **WITHOUT**
14 **PREJUDICE**. A proposed order accompanies this Report and Recommendation.

15 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
16 the parties shall have ten (10) days from service of this Report and Recommendation to file written
17 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
18 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time
19 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **August 25,**
20 **2006** as noted in the caption.

21 DATED this 2nd day of August, 2006.

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25 Karen L. Strombom
26 United States Magistrate Judge
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